

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
WESTERN WASHINGTON REGION  
STATE OF WASHINGTON

YEW STREET ASSOCIATES, HILLSIDE  
ASSOCIATES, WESTPAC MANAGEMENT,  
INC., FRANK AND SANDRA MULJAT, AND  
J&M, LLC,

Petitioners,

v.

WHATCOM COUNTY,

Respondent,

And

CITY OF BELLINGHAM and MARBLE FALLS,  
LLC,

Intervenors.

**CASE No. 10-2-0009c**

**ORDER ON DISPOSITIVE MOTION**

**I. BACKGROUND**

This matter was commenced in 2010 by the Petitioners following Whatcom County's adoption of Ordinance No. 2009-071.<sup>1</sup> That ordinance was adopted to comply with the GMA requirement to review the County's Urban Growth Areas (UGA), their densities, and revise those areas/densities as needed to accommodate 20 year projected urban growth. The Ordinance constituted an amendment of the County's Comprehensive Plan under RCW 36.70A.130(3).<sup>2</sup>

<sup>1</sup> Ordinance No. 2009-071 was challenged by other parties as well and numerous parties intervened. Those claims have been resolved.

<sup>2</sup> Each county that designates urban growth areas under RCW 36.70A.110 shall review, according to the schedules established in subsection (5) of this section, its designated urban growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area. In

1           Petitioners have real property interests outside of the City of Bellingham's municipal  
2 boundary. Prior to Whatcom County's adoption of Ordinance No. 2009-071, those properties  
3 were within the City's Yew Street UGA. The County Plan defines UGAs as "Areas  
4 characterized by urban growth and that have existing public facility and service capacities;  
5 areas characterized by urban growth that may be served with urban services in the future;  
6 and lands adjacent to areas characterized by urban growth". The Ordinance removed  
7 Petitioners' properties from the City's UGA and re-designated them as UGA Reserve.<sup>3</sup> UGA  
8 Reserve is defined in the County Plan as "Areas that are not yet suited for urban growth but  
9 are logical areas in which the urban area would likely grow beyond current growth  
10 allocations after being properly designated as an Urban Growth Area".<sup>4</sup> It appears that the  
11 re-designation to UGA Reserve was the primary impetus for the Petitioners' challenge as  
12 development opportunities within a UGA Reserve are much more limited.  
13

14           Following resolution and dismissal of the claims of other petitioners challenging  
15 Ordinance 2009-071 and at the request of the now remaining parties, the Board granted a  
16 number of settlement extensions. It is apparent that those extensions were sought in the  
17 hope that the County's next RCW 36.70A.130 comprehensive plan update would resolve  
18 Petitioners' claims by returning their properties to the City of Bellingham's UGA. Ultimately,  
19 the County adopted its next required update, Ordinance 2016-034, but that update did not  
20 place Petitioners' real property back in the City's UGA. Whatcom County and the City of  
21 Bellingham (referred to herein as the "County") have now filed a motion to dismiss all of the  
22 Petitioners' issues, arguing those issues are now moot, fail to state claims upon which the  
23 Board can grant relief, and/or are unsupportable as a matter of law.<sup>5</sup>  
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30           in conjunction with this review by the county, each city located within an urban growth area shall review the  
31 densities permitted within its boundaries, and the extent to which the urban growth occurring within the county  
32 has located within each city and the unincorporated portions of the urban growth areas.

<sup>3</sup> Ordinance No. 2009-071 at 2-72.

<sup>4</sup> *Id.* at 2-77.

<sup>5</sup> Whatcom County/City of Bellingham Joint Dispositive Motions (September 15, 2016).

## II. DISCUSSION AND ANALYSIS

**A. UGA and Private Property Rights:** At least five of the Petitioners' twenty issue statements focus specifically on the UGA Reserve decision and private property rights.<sup>6</sup>

10. Does the removal of lands from an urban growth area over the objections of landowners in the midst of moving forward with development approval processes violate RCW 36.70A.020(1), (2), (6), and/or (7), RCW 36.70A.370, and/or Whatcom County's County-Wide Planning Policies A-4, P-1, and/or P-2?

14. Does removing an area from an urban growth area that is partially developed at urban density and includes significant ongoing development plans violate RCW 36.70A.020(1), (2), (6), and/or (7), RCW 36.70A.110, RCW 36.70A.370, and/or Whatcom County's County-Wide Planning Policies D-2 and/or D-5?

16. Does removing a property from an urban growth area where the property owner has relied on urban growth status in making a significant investment into that property for future development violate the growth Management Act (1995 Wash. Laws 34 7 § 1), RCW 36.70A.370, the notion that traditional urban growth areas provide certainty to landowners, and/or Whatcom County's County-Wide Planning Policies P-1 and/or P-2?

19. Does the County's flawed basis for removing property from an urban growth area violate RCW 36.70A.020(6) and/or Whatcom County's County-Wide Planning Policies C-3b?

20. Does the County's removal of certain lands from a long established urban growth area constitute a violation of RCW 36.70A.370(2), Whatcom County Charter Section 1.11, and/or Whatcom County's County-Wide Planning Policies P-1 and P-2?

The GMA violations asserted in those issue statements involve the Petitioners' alleged property rights; specifically, violations of RCW 36.70A.020(6) and RCW 36.70A.370.<sup>7</sup> The Petitioners characterize those allegations as "takings claims"<sup>8</sup> or

<sup>6</sup> Those issue statement numbers are shown in the Board's Prehearing Order of May 2, 2016. The Petitioners' Issue Statements as set out in their Petition for Review dated January 26, 2010, are the same but are preceded by the numeral "3".

<sup>7</sup> RCW 36.70A.020 (6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

RCW 36.70A.370(1) The state attorney general shall establish by October 1, 1991, an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to

1 “constitutional claims”<sup>9</sup>. During prior hearings and in pleadings, the Petitioners have  
2 expressed concerns regarding the need to exhaust their administrative remedies in regards  
3 to their constitutional claims.<sup>10</sup>

4 While the first sentence of RCW 36.70A.020(6) relates to the unconstitutional taking  
5 of property, the Board has no authority to determine constitutional issues.<sup>11</sup>

6 Goal 6 contains two separate and distinct goals; (1) takings and (2) protection  
7 from arbitrary and discriminatory actions. We have previously held ...that our  
8 jurisdiction granted under the Act does not include resolution of violations of  
9 the U.S. and/or Washington State Constitution. Rather the “takings” prong of  
10 Goal 6 is to be reviewed to determine if adequate consideration of that prong  
11 has been given by the decision makers.<sup>12</sup>

12 The County has moved to dismiss these claims, arguing that the issues fail to state  
13 claims upon which the Board can grant relief: either that the Board lacks the power to direct  
14 the County to include any specific property within a UGA or, alternatively, that no recognized  
15 property right of the Petitioners has been impacted.<sup>13</sup> It correctly asserts that the Board, in  
16 the context of these issues, only has the authority to determine whether or not the County  
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18  
19 evaluate proposed regulatory or administrative actions to assure that such actions do not result in an  
20 unconstitutional taking of private property. It is not the purpose of this section to expand or reduce the scope of  
21 private property protections provided in the state and federal Constitutions. The attorney general shall review  
22 and update the process at least on an annual basis to maintain consistency with changes in case law.

23 (2) Local governments that are required or choose to plan under RCW 36.70A.040 and state agencies shall  
24 utilize the process established by subsection (1) of this section to assure that proposed regulatory or  
25 administrative actions do not result in an unconstitutional taking of private property.

26 (3) The attorney general, in consultation with the Washington state bar association, shall develop a continuing  
27 education course to implement this section.

28 (4) The process used by government agencies shall be protected by attorney client privilege. Nothing in this  
29 section grants a private party the right to seek judicial relief requiring compliance with the provisions of this  
30 section.

31 <sup>8</sup> Joint Status Report (April 17, 2016).

32 <sup>9</sup> Petitioners’ Status Report (May 1, 2015).

<sup>10</sup> *Id.* at 5: “A petition for review filed in superior court must follow the Administrative Procedures Act, which  
explicitly requires that the Petitioners exhaust ‘all administrative remedies available within the agency whose  
action is being challenged.’ Although the Board states that it cannot decide constitutional arguments, this does  
not excuse the Petitioners from showing to the superior court that there has been exhaustion of administrative  
remedies.”

<sup>11</sup> *Laurel Park v. City of Tumwater*, GMHB No. 09-2-0010, (FDO, October 13, 2009) at 10; *Weyerhaeuser et  
al. v. Thurston County*, GMHB No. 10-2-0020c, (FDO, June 17, 2011) at 56.

<sup>12</sup> *Laurel Park* at 10.

<sup>13</sup> Memorandum in Support of Joint Motion to Dismiss (September 15, 2016) at 5, 6.

1 designated UGAs sufficient in size to accommodate projected urban growth.<sup>14</sup> In their  
2 response, the Petitioners focus on what they describe as the “arbitrary and discriminatory  
3 action” of the County in “excluding their property from the UGA”.<sup>15</sup> The specifics of their  
4 GMA violation allegations in this regard are:

5 1) [The County discriminated] against the Petitioners in failing to fulfill the  
6 promises associated with being in a UGA; 2) [in] failing to allow the  
7 Petitioners to develop their property currently because the UGA “Reserve”  
8 designation essentially freezes the property to the benefit of the County and  
9 City; and 3) [in] failing to provide adequate facilities to the properties left in the  
10 UGA within the planning horizon.<sup>16</sup>

11 The Petitioners argue their lands were removed from the UGA “over the objections of  
12 landowners in the midst of moving forward with development approval”, that the lands were  
13 “partially developed at urban density and include[d] significant ongoing development plans”,  
14 that petitioners had “relied on urban growth status in making a significant investment into  
15 that property for future development”, and that the County’s decision had “a flawed basis”.<sup>17</sup>

16 In *Manke Lumber Co. v. Hearings Bd.*, a landowner’s properties were removed by  
17 Kitsap County from a UGA designation. The Court of Appeal’s observations are relevant  
18 here:

19 Even assuming Posten did not abandon this argument, the Board previously  
20 rejected Keyport’s designation as a UGA. The Board properly found that after  
21 correctly sizing the various UGA’s based on projected population growth, the  
22 County had the discretion to designate and locate the UGAs to best meet its  
23 needs. RCW 36.70A.3021 allows local governments to exercise this  
24 discretion. Posten mistakenly relies on the belief that an area possessing  
25 some urban features mandates designating it as a UGA, or that the former  
26 characterization of Keyport as a UGA compels the same classification. . . .

27 <sup>14</sup> [The Board’s] role is to ensure that the County’s actions comply with the goals and requirements of the  
28 GMA, in this case –that the Bellingham UGA is sized to accommodate its allocated population projections.  
29 *Petree, et al v. Whatcom County*, GMHB No. 08-2-0021c (FDO, October 13, 2008) at 28-29. Petitioners  
30 acknowledge that they are not suggesting the Board has the power to order the County to reinstate the UGA  
31 designation for their properties: “The County in this case has made the incorrect assumption that the  
32 Petitioners are requesting the Board to order the County to put the property back into the UGA.” Petitioners’  
Response to Whatcom County and City of Bellingham’s Joint Motion to Dismiss (September 30, 2016) at 4, 5.

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 6.

1 The County reasonably selected other UGA locations with room for future  
2 growth. Posten fails to show that the Board erred in validating the County's  
3 decision.<sup>18</sup>

4 As stated above, the GMA places the obligation on counties to establish UGA  
5 boundaries.<sup>19</sup> There is no property right which precludes a local government from  
6 designating an area as a UGA or de-designating that area, just as there is no property right  
7 preventing local government from changing zoning designations.<sup>20</sup>

8 GMA Goal 6, RCW 36.70A.020(6), states in part: The property rights of landowners  
9 shall be protected from arbitrary and discriminatory actions (Emphasis added). To reach the  
10 question of whether or not the County's action was "arbitrary and discriminatory", as alleged  
11 by these Petitioners, first requires that a property right has been impacted. The Board  
12 agrees with the Petitioners' assertion that "It is well-settled in Washington that the right to  
13 develop one's land in accordance with applicable zoning is a property right".<sup>21</sup> However,  
14 that assumes the vesting of a development permit.<sup>22</sup> From the Hearing on Motions  
15 transcript, the Board notes that Petitioners do not have vested development permits.<sup>23</sup>

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18 "Washington's vested rights doctrine, as it was originally judicially recognized,  
19 entitles developers to have a land development proposal processed under the  
20 regulations in effect at the time a complete building permit application is filed,  
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22 <sup>18</sup> 113 Wn. App. 615, 630-631 (Wash. Ct. App. 2002)

23 <sup>19</sup> *Petree, et al v. Whatcom County*, GMHB No. 08-2-0021c (FDO, October 13, 2008) at 28- 29.

24 <sup>20</sup> The term "property rights of landowners" could not have been intended by the Legislature to mean any of  
25 the penumbra of "rights" thought to exist by some, if not many, landowners in today's society. Such  
26 unrecognized "rights" as the right to divide portions of land for inheritance or financing, or "rights" involving  
27 local government never having the ability to change zoning, or "rights" to subdivide and develop land for  
28 maximum personal financial gain regardless of the cost to the general populace, are not included in the  
29 definition in this prong of Goal 6. Rather the "rights" intended by the Legislature could only have been those  
30 which are legally recognized, e.g., statutory, constitutional, and/or by court decision. *Achen v. Clark County*  
31 GMHB 95-2-0067c (FDO, September 20, 1995) at 10. See also GMHB No. 09-2-0010 (FDO, October 13,  
32 2009) at 12: "Because there is no right to the continuation of existing zoning, there is no dispossession of a  
property right by City action that changes the zoning of their property. This includes a zoning change that limits  
the use of their property almost exclusively to manufactured home Parks."

<sup>21</sup> Petitioners' Response to Motion to Dismiss at 4.

<sup>22</sup> Under this [vested rights] doctrine, developers who file a timely and complete building permit application  
obtain a vested right to have their application processed according to the zoning and building ordinances in  
effect at the time of the application. *W. Main Assocs. v. Bellevue*, 106 Wn.2d 47, 50-51 (Wash. 1986).

<sup>23</sup> Hearing on Motions Transcript (October 17, 2016) at 18 and 37.

1 regardless of subsequent changes in zoning or other land use  
2 regulations....Our state employs a "date certain" standard for vesting."<sup>24</sup>

3 In this case, Petitioners' allegations do not involve any recognized property right  
4 because they do not have a vested development permit. Rather, the "rights" they set forth  
5 are the right to have "the promises associated with being in a UGA" fulfilled, the right to  
6 "develop their property" under the UGA designation, and the right to have the County [or  
7 City] "provide adequate facilities".<sup>25</sup> Because the Board concludes the County action did not  
8 affect a recognized property right, the Board does not reach the question of whether that  
9 action was arbitrary and discriminatory.  
10

11 Petitioners further claim RCW 36.70A.370(2) was violated (Issue 20). This provision  
12 requires a local government to follow a process outlined by the Attorney General's Office to  
13 ensure no unconstitutional taking of private property.<sup>26</sup> Petitioners failed to address this  
14 claim in its brief or at oral argument. Consequently, it is deemed abandoned. WAC 242-03-  
15 590(3). The Board grants the Respondents' motion to dismiss Issues 10, 14, 16, 19, and 20  
16 as the Petitioners are unable to establish violations of RCW 36.70A.370 or RCW  
17 36.70A.020(6).  
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20 **B. Mootness:** Respondents argue Petitioners' Issues 1-8, 15, and 20 are moot  
21 because the County adopted an entirely new comprehensive plan in 2016 replacing the  
22 2009 Comprehensive Plan on which the Petitioners original UGA claims were based. The  
23 UGAs designated in Ordinance 2009-071 were based upon the 2007 population projections  
24 made for the County by the Office of Financial Management (OFM) and were established to  
25 accommodate urban growth for the 20 year period between 2009 and 2029, as required by  
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29 <sup>24</sup> *Abbey Rd. Grp. LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251, 218 P.3d 180 (2009); *Hull v. Hunt*, 53  
30 Wn.2d 125, 130, 331 P.2d 856 (1958).

31 <sup>25</sup> Petitioners do not dispute the moving parties' assertion that Petitioners do "not have any development  
32 permit applications filed that would vest . . ." Memorandum in Support of Joint Motion to Dismiss at 2.

<sup>26</sup> RCW 36.70A.370(2) Local governments that are required or choose to plan under RCW 36.70A.040 and  
state agencies shall utilize the process established by subsection (1) of this section to assure that proposed  
regulatory or administrative actions do not result in an unconstitutional taking of private property.

1 RCW 36.70A.130 and RCW 36.70A.110.<sup>27</sup> Ordinance 2016-034 represented the  
2 culmination of the County's next required RCW 36.70A.130 comprehensive plan/urban  
3 growth area update. The UGAs established pursuant to the 2016 ordinance were based  
4 upon a new OFM population projection<sup>28</sup> and are designed to accommodate urban growth  
5 for the period of 2016 and 2036.

6 The County argues that the 2016 ordinance process included a complete review of  
7 UGA boundaries, employing a methodology revised since 2009 with a new land capacity  
8 analysis, an updated capital facilities plan, and a new and different public participation  
9 plan.<sup>29</sup> It asserts Ordinance 2016-034 "materially amended" the prior Comprehensive  
10 Plan.<sup>30</sup> The County contends Petitioners' Issues 1 - 8, 15, and 20<sup>31</sup> are moot as those  
11 issues focus on and challenge the process used to develop the 2009 ordinance's UGAs.  
12 The County states that with adoption of the 2016 update, the 2009 process and its resulting  
13 UGAs are no longer at issue. Citing *Orwick v. City of Seattle*<sup>32</sup>, it states these issues are  
14 moot as the Board cannot provide relief in that the "end product of that process no longer  
15 exists".<sup>33</sup> Its position is that the "relief" available to the Board includes findings of GMA non-  
16 compliance and remand to the County to achieve GMA compliance with the possibility of  
17 determinations of invalidity.<sup>34</sup>

18 The Petitioners first state Ordinance 2016-034 did not change any of the County-  
19 wide Planning Policies referenced in their issue statements. Issues 1-8, 15, and 20 (as well  
20 as all but one of the other issue statements) include allegations of violations of County-wide  
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24 <sup>27</sup> RCW 36.70A.110(2) Based upon the growth management population projection made for the county by the  
25 office of financial management, the county and each city within the county shall include areas and densities  
26 sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-  
27 year period . . . As part of this planning process, each city within the county must include areas sufficient to  
28 accommodate the broad range of needs and uses that will accompany the projected urban growth including,  
29 as appropriate, medical, governmental, institutional, commercial, service, retail, and other nonresidential uses.  
30 See Ordinance 2009-071 Findings of Fact 40 to 58 at 10-13.

31 <sup>28</sup> Ordinance 2016-034 Finding of Fact 43 at 11.

32 <sup>29</sup> Hearing on Motions Transcript at 10.

33 <sup>30</sup> Memorandum in Support of Joint Motion to Dismiss at 3.

34 <sup>31</sup> Those issue statements are set out in full in Appendix A below.

<sup>32</sup> 103 Wn.2d 249, 253 (1984).

<sup>33</sup> Hearing on Motions Transcript at 11-14.

<sup>34</sup> RCW 36.70A.300 and RCW 36.70A.302.



1 Planning Policies (CPPs).<sup>35</sup> The Board does not have jurisdiction to rule on whether or not a  
2 jurisdiction's actions violate CPPs. Jurisdiction is limited to ruling on whether or not  
3 legislative action "is in compliance with the requirements of" the GMA. (RCW 36.70A.280,<sup>36</sup>  
4 RCW 36.70A.300 and RCW 36.70A.302) CPPs establish a framework for consistency  
5 between a county and its cities; they "establish the scope and intent of inter-jurisdictional  
6 coordination and joint planning necessary to demonstrate compliance with RCW  
7 36.70A.100".<sup>37</sup> Petitioners have not alleged the violation of any GMA statute(s) which might  
8 have been violated due to the County's failure to follow CPPs, let alone any inconsistencies  
9 arising due to such a failure.<sup>38</sup> Rather, they allege violations of the CPPs themselves. Those  
10 portions of the Petitioners' issue statements alleging violations of the County's CPPs are  
11 dismissed as they fail to state claims within the Board's jurisdiction.  
12

13 Petitioners disagree with the Respondents' argument that Issues 1-8, 15, and 20 are  
14 moot. They argue that when an action is replaced by one that is "substantially similar" or  
15 "that does not have substantial changes" it is not moot, citing *Peninsula Neighborhood*  
16 *Assoc. v. Pierce County*.<sup>39</sup> That case presents substantially different facts. In *Peninsula*  
17 *Neighborhood*, the second ordinance upon which the claim of mootness was based was an  
18 amendment to a definition and findings of fact to support the earlier, challenged ordinance.  
19 As the Board stated, the revised ordinance "merely changes a few aspects of Ordinance 96-  
20 97, and does not supersede the challenged portion of Ordinance 96-97".  
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25 <sup>35</sup> Those issue statements are set out in full in Appendix A below.

26 <sup>36</sup> (1) The growth management hearings board shall hear and determine only those petitions alleging either:  
27 (a) That, except as provided otherwise by this subsection, a state agency, county, or city planning under this  
28 chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the  
29 adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans,  
30 development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW.

31 <sup>37</sup> *City of Shoreline v. Snohomish County*, GMHB Nos. 09-3-0013c and 10-3-0011c, (CFDO, May 17, 2011) at  
32 32. *King County v. CPSGMHB*, 138 Wn.2d 161, 175, 979 P.2d 374 (1999) ("The CPPs are thus the major tool  
provided in the GMA to ensure that the comprehensive plans of each city within a county agree with each  
other")

<sup>38</sup> The framework for coordinated planning between a county and cities within that county is established by the  
county-wide planning policies required by RCW 36.70A.210. That framework then ensures that city and county  
comprehensive plans are consistent as required by RCW 36.70A.100. See *City of Shoreline* CFDO at 31-32.

<sup>39</sup> CPSGMHB No. 96-3-0039 (Order Denying Motion to Dismiss, April 9, 1997).

1 RCW 36.70A.130(1)(a) required the County to review, and if needed, revise its  
2 comprehensive plan and implementing development regulations “to ensure the plan and  
3 regulations comply with the” GMA. Included in that review are the RCW 36.70A.130(3)(a)  
4 and (b) requirements to review its designated urban growth areas and the densities  
5 permitted within them and revise them to accommodate projected population growth.  
6 Whatcom County did that in 2009 with the adoption of Ordinance 2009-071 and again in  
7 2016, culminating with the adoption of Ordinance 2016-034.  
8

9 In its latest 2016 review and revision, the County and each of its cities developed a  
10 new land capacity analysis for the purpose of ascertaining the ability of the County’s UGAs  
11 to accommodate the updated, anticipated population, and employment growth.<sup>40</sup> As part of  
12 that analysis, the following steps were taken:<sup>41</sup>

- 13 • Geographic information was assembled for each UGA;
- 14 • Parcels within each UGA were categorized as to whether they were vacant,  
15 developed, publicly owned, etc.;
- 16 • Net developable acres were calculated;
- 17 • Net developable residential acres were multiplied by assumed densities;
- 18 • Dwelling unit capacity was multiplied by occupancy rates to determine population  
19 growth capacity;
- 20 • Similar steps were taken in regards to commercial and industrial acreage;
- 21 • Determined capacities were then compared with the proposed new population  
22 allocated to each UGA.  
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26 The Board agrees with the County that Petitioners’ Issues 1- 8 and 15 challenge the  
27 process and end product of the County’s 2009 comprehensive plan/UGA update. (Issue 20  
28 was addressed above in Section A). That end product was then reviewed, revised, and  
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31 <sup>40</sup> Memorandum in Support of Joint Motion to Dismiss, Appendix 3 (Land Capacity Analysis Report) at 1. See  
32 also Appendix B to Appendix 3, the September 18, 2015 Whatcom County Land Capacity Analysis, Detailed  
Methodology.

<sup>41</sup> Appendix 3, Land Capacity Analysis Report at 3.

1 replaced by the August 9, 2016, Whatcom County Comprehensive Plan. While the 2016  
2 Plan does not reflect significant changes in the County's UGAs, including the Yew Street  
3 UGA, the entire process, analysis, and outcome are based on new population/employment  
4 estimates and a new, thorough analysis. The earlier plan focused on the 20-year planning  
5 period from 2009-2029 while the 2016 plan now addresses the 2016-2036 period. The 2016  
6 Comprehensive Plan has superseded the earlier plan. Ordinance 2016-034 is a "completely  
7 new update"; it is a "substitute for the entire [comprehensive] plan", to paraphrase the  
8 Supreme Court in *Citizens v. Klickitat County*.<sup>42</sup> The Board can provide no relief in regards  
9 to the challenges raised in Issues 1 -8, 15, and 20, and they are moot.  
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11  
12 **C. Agricultural Lands, City Comments, Sub-Area Plans and Service Provisions:**

13 The remaining issues include 9, 11-13, 17, and 18, which the Board addresses below.

- 14 9. Does the inclusion of lands designated (zoned) as agricultural lands, pursuant to  
15 RCW 36.70A.170, inside a number of Whatcom County's urban growth areas  
16 without a program authorizing transfer or purchase of development rights in place  
17 for those lands violate RCW 36.70A.060(4) and/or Whatcom County's County-  
18 Wide Planning Policy C-5?

19 Petitioners' argument in regards to Issue 9 is difficult to understand. They allege that  
20 the County has included "designated" agricultural land within some UGAs. The County flatly  
21 denies the contention, while Petitioners contend there is no GMA distinction between  
22 designated Agricultural Lands of Long Term Commercial Significance and land zoned for  
23 agricultural use.<sup>43</sup> It appears to the Board that Petitioners misunderstood the difference  
24 between natural resource lands designated pursuant to RCW 36.70A.170<sup>44</sup> and lands  
25 zoned for agricultural use. The two are not synonymous although designated agricultural  
26 resource lands might very well be zoned for agricultural uses. Petitioners fail to show how  
27 the County has violated RCW 36.70A.060(4) or RCW 36.70A.170. The Board agrees with  
28 the County that Issue 9 is meritless.  
29

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31 <sup>42</sup> 122 Wn.2d 619, 630 (1993).

32 <sup>43</sup> Petitioners' Response to Motion to Dismiss at 11.

<sup>44</sup> See WAC 365-190-050 for the process to designate Agricultural Lands of Long-Term Commercial Significance.

1 11. Does the removal of lands from an urban growth area over the objections of cities  
2 with long established and defined to be compliant Comprehensive Plans for those  
3 urban growth areas complete with capital facilities plans defined as compliant due  
4 to lack of challenge of the city's Comprehensive Plans violate RCW  
5 36.70A.020(11), RCW 36.70A.100, RCW 36.70A.130(3)(a), RCW  
6 36.70A.210(3)(a), and/or Whatcom County Wide Planning Policies C-2, C-3b,  
7 and/or D-2?

8 The Petitioners argument consists of the mere allegation that property was removed  
9 from UGAs over the "objections of cities". Assuming for purposes of discussion that some  
10 cities did object, counties are the ultimate decision makers on UGA boundaries. The Board  
11 agrees with the County that Issue 11 is meritless.

12 12. Does the fact that the various County Subarea Plans, many of which pre-date the  
13 Growth Management Act, are inconsistent with the County Comprehensive Plan  
14 violate RCW 36.70A.080(2), RCW 36.70A.100, and/or Whatcom County's County-  
15 Wide Planning Policy C-2?

16 13. Do the inconsistencies between the Bellingham Urban Fringe Subarea Plan and  
17 the Whatcom County Comprehensive Plan violate RCW 36.70A.040, RCW  
18 36.70A.070(1), (2), and/or (3), RCW 36.70A.080(2), RCW 36.70A.100, RCW  
19 36.70A.110(2), RCW 36.70A.115, RCW 36.70A.130 (3)(a) and/or (3)(b), RCW  
20 3670A.210(3)(a), and/or Whatcom County's County-Wide Planning Policy F-11?

21 Issues 12 and 13 allege inconsistencies between the County's Comprehensive Plan  
22 and various sub-area plans. As the County observes, its plan includes Policy 2L-2b, a  
23 provision that specifically clarifies that in the event of any such inconsistency, it is the  
24 Comprehensive Plan that prevails.<sup>45</sup> The Board agrees with the County that Issue 12 and 13  
25 are meritless.

26 17. Does the County's inability to allow urban development within an urban growth  
27 area during the planning horizon (i.e. 20 year period) violate RCW 36.70A.110  
28 and/or breach the County's duty to landowners owning property within that urban  
29 growth area?

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32 <sup>45</sup> In the event there is an inconsistency between a Subarea Plan and the Whatcom County Comprehensive  
Plan, the Whatcom County Comprehensive Plan shall prevail. Ordinance 2009-071, Ex. A, at 2-14.

1 18. Do the County's development regulations and policies that effectively prohibit  
2 urban development in an urban growth area violate RCW 36.70A.020(1), (2), (6),  
3 and/or (7), RCW 36.70A.040, RCW 36.70A.110, and/or RCW 36.70A.115?

4 The County observes that Issues 17 and 18 may be challenges to County and City of  
5 Bellingham plans and/or development regulations that require the provision of public sewer  
6 and water service prior to urban density UGA development. The Board notes that RCW  
7 36.70A.110(4) provides: In general, cities are the units of local government most  
8 appropriate to provide urban governmental services. Furthermore, RCW 36.70A.110(3)  
9 provides: Urban growth should be located first in areas already characterized by urban  
10 growth that have adequate existing public facility and service capacities to serve such  
11 development; second in areas already characterized by urban growth that will be served  
12 adequately by a combination of both existing public facilities and services and any additional  
13 needed public facilities and services that are provided by either public or private sources,  
14 and; third in the remaining portions of the urban growth areas. Finally, RCW 36.70A.110  
15 requires that jurisdictions provide areas and densities sufficient to accommodate the growth  
16 over 20 year planning horizons. Petitioners appear to suggest that either the County or the  
17 City is under some obligation to allow urban densities and provide urban services upon  
18 request of a property owner. The Board knows of no GMA requirement mandating the timing  
19 of provision of urban level services and urban level densities other than within the 20 year  
20 planning horizon. Neither have the Petitioners provided legal support for any such  
21 requirement. The Board agrees with the County that Issue 17 and 18 are meritless.  
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### 25 III. ORDER

26 Based on the foregoing, the Whatcom County/City of Bellingham motion to dismiss is  
27 granted. The Petition for Review is dismissed and this case is closed.  
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29 Dated this 21st day of October, 2016.  
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32 William Roehl, Board Member

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Nina Carter, Board Member

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Charles Mosher, Board Member

**Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.<sup>46</sup>**

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<sup>46</sup> Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), WAC 242-3-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

## APPENDIX A

1. Does the lack of a land and housing demand analysis violate RCW 36.70A.070(1), (2), and/or (3), RCW 36.70A.110(2), RCW 36.70A.115, RCW 36.70A.130(3)(a) and/or (3)(b), and/or Whatcom County's County-Wide Planning Policy C-3b?
2. Does the failure to include the records (sic) at least 3 years of the ten years in the County's ten year review of growth associated with its Comprehensive Plan violate RCW 36.70A.070(1), (2), and/or (3), RCW 36.70A.110(2), RCW 36.70A.115, RCW 36.70A.130(3)(a) and/or (3)(b), and/or Whatcom County's County-Wide Planning Policies C-3a and C-3b?
3. Does Whatcom County's lack of a record demonstrating that the cities provided (1) city reviews of densities permitted within their boundaries and/or (2) reports regarding the extent to which the urban growth occurring within the County has located within each city and the unincorporated portions of the urban growth areas violate RCW 36.70A.070(1), (2), and/or (3), RCW 36.70A.110(2), RCW 36.70A.115, RCW 36.70A.130(3)(a) and/or (3)(b), and/or Whatcom County's County-Wide Planning Policy C-3b?
4. Does utilizing erroneous data (recognized as such in the County's record) as the basis of the population projection utilized to ascertain the growth that must be accommodated for 20 years succeeding the ten year review violate RCW 36.70A.070(1), (2), and/or (3), RCW 36.70A.110(2), RCW 36.70A.115, RCW 36.70A.130(3)(a) and/or (3)(b), RCW 36.70A.210(3), and/or Whatcom County's County-Wide Planning Policies C-2, C-3a, and/or C-3b?
5. Does acknowledging by adoption into the Comprehensive Plan that inadequate capital facilities exist in some urban growth areas then formally delaying action to bring the shortcomings into compliance until future 7 year or 10 year review periods RCW 36.70A.070(1), (2), and/or (3), RCW 36.70A.110(2), RCW 36.70A.115, RCW 36.70A.130(3)(a) and/or (3)(b), RCW 36.70A.210(3), and/or Whatcom County's County Wide Planning Policies C-2 and/or C-3b?
6. Does the identified lack of capital facilities planning and/or approved and updated capital facilities plans in a number of urban growth areas violate RCW 36.70A.070(1), (2), and/or (3), RCW 36.70A.110(2), RCW 36.70A.115, RCW 36.70A.130(3)(a) and/or (3)(b), and/or Whatcom County's County-Wide Planning Policies C-2 and C-3b?

- 1 7. Does the (1) disparity between populations reported in the various urban growth  
2 areas and actual populations in the urban growth areas, (2) the accompanying  
3 disparities between growth allocated the urban growth areas (net growth) and the  
4 growth that must actually occur to meet growth projected to each urban growth  
5 area, and (3) the failure to account for the additional growth that must take place  
6 in various urban growth areas to meet projected accommodation levels in the  
7 Land Capacity Analysis violate RCW 36.70A.070(1), (2), and/or (3), RCW  
8 36.70A.110(2), RCW 36.70A.115, RCW 36.70A.130(3)(a) and/or (3)(b), and/or  
9 Whatcom County's County-Wide Planning Policies C-2 and/or C-3b?
- 10 8. In calculating land necessary to accommodate growth projected for the 20 years  
11 succeeding the ten-year review, does Whatcom County's use of population  
12 allocated to lands, which are not permitted based on the densities assigned to  
13 those lands violate RCW 36.70A.070(1), (2), and/or (3), RCW 36.70A.110(2),  
14 RCW 36.70A.115, RCW 36.70A.130(3)(a) and/or (3)(b), and/or Whatcom  
15 County's County-Wide Planning Policies C-2, C-3a, C-3b, and/or D-1?
- 16 15. Does withdrawal of several thousand acres of land from the urban growth areas  
17 without providing actual notice to each land owner violate the notice and public  
18 participation requirements of RCW 36.70A.035, RCW 36.70A.130(2), RCW  
19 36.70A.140, and/or Whatcom County's County-Wide Planning Policies A-2, A-3,  
20 A-4, and A-5?
- 21 16. Does removing a property from an urban growth area where the property owner  
22 has relied on urban growth status in making a significant investment into that  
23 property for future development violate the growth Management Act (1995 Wash.  
24 Laws 34 7 § 1 ), RCW 36.70A.370, the notion that traditional urban growth areas  
25 provide certainty to landowners, and/or Whatcom County's County-Wide Planning  
26 Policies P-1 and/or P-2?
- 27 17. Does the County's inability to allow urban development within an urban growth  
28 area during the planning horizon (i.e. 20 year period) violate RCW 36.70A.110  
29 and/or breach the County's duty to landowners owning property within that urban  
30 growth area?
- 31 18. Do the County's development regulations and policies that effectively prohibit  
32 urban development in an urban growth area violate RCW 36.70A.020(1), (2), (6),  
and/or (7), RCW 36.70A.040, RCW 36.70A.110, and/or RCW 36.70A.115?
19. Does the County's flawed basis for removing property from an urban growth area  
violate RCW 36.70A.020(6) and/or Whatcom County's County-Wide Planning  
Policies C-3b?



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2 20. Does the County's removal of certain lands from a long established urban growth  
3 area constitute a violation of RCW 36.70A.370(2), Whatcom County Charter  
4 Section 1.11, and/or Whatcom County's County-Wide Planning Policies P-1 and  
5 P-2?  
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